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Reasserting Federalism in Defense of Liberty

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The following is adapted from a speech delivered on April 1, 2011, in the "First Principles on First Fridays" lecture series sponsored by Hillsdale College's Kirby Center for Constitutional Studies and Citizenship in Washington, D.C.

Some favorite Virginians of mine who inspired and crafted our federal Constitution—Mason, Madison, Jefferson, and Henry—also drafted the Constitution of Virginia. And in the latter, they included a critical statement that said, "No free government, nor the blessings of liberty, can be preserved . . . but by frequent recurrence to fundamental principles."

Our founders well understood that our liberty could not be preserved without frequently referring back to first principles. But while they pledged their lives, their fortunes, and their sacred honor to defend those principles, we have often taken them for granted, as we have become complacent in thinking that government will take care of every problem.

We have asked government to do more for us, and all the government asks for in return is a little bit more of our liberty. Over the decades, we kept asking. And because the courts and the politicians were all too happy to oblige, regardless of what the Constitution said, we no longer have a federal government of limited powers. We have an overreaching central government—a government that seeks to plan and control virtually every aspect of our lives and our economy, from health care, to energy, to automobile manufacturing, to banking and insurance.

Thankfully, though, in the last several years, people have woken up and are pushing back. With this pushback, we are seeing the idea of federalism reemerge. People want to return to a government of limited, enumerated powers, and an arrangement in which states serve as a check when the federal government oversteps its constitutional bounds.

In the current lawsuits brought by the states over health care and against the EPA, state governments are pushing back and reasserting federalism as the Founders intended them to do. Indeed, I am not aware of a time in history when this many states have sued the federal government to rein in its power: Today, more than half are parties to lawsuits against the new health care act and its individual health insurance mandate.

Virginia was the first state to argue in federal court that the new health care law is unconstitutional. When we brought the suit in March 2010, most media outlets and many legal experts said we stood no chance. One law professor said our argument about constitutionality was, if not frivolous, close to it. Another legal expert said our case relied on a "controversial reading of the Constitution." Apparently, it is controversial to apply the Constitution as it was written.

But back in December, when a federal judge ruled in Virginia's favor that the mandate is unconstitutional, assertions that we did not stand a chance faded fast.

Shades of King George III

Let me explain a bit about our lawsuit. Our first legal argument is that the government's attempt to use the Commerce Clause of the Constitution to mandate the purchase of a private product—in this case, health insurance—goes beyond Congress's power. The reason there has never been a mandate like this in all of American history is because, up until now, everyone knew Congress lacked the power to impose one.

I often give the example of the colonial period, when the colonists were boycotting British goods while demanding that King George III and Parliament repeal the Stamp Act and the Intolerable Acts. I am sure it was to the king's dismay, but his own lawyer—the solicitor general—told Parliament that the boycott was legal under British law. In other words, the colonists could not be forced to buy British goods.

Yet in 2010, we had a president and a Congress who believed they could compel Americans to buy a private product even when the king of England, whom we rebelled against, knew he did not have that power. And back then, we were merely subjects!

The federal government has argued in court that not buying health insurance is as much of an economic activity as buying it, and therefore that it can regulate a citizen's decision *not* to buy government-approved health insurance under the Commerce Clause. Nonactivity is the same

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as activity in the government's argument. Clearly, someone in Washington needs a dictionary.

That same reasoning could be used to force us to buy cars, vegetables, or gym memberships. If Virginia loses this suit and the federal government is allowed to cross this line, Congress will be granted a virtually unlimited power to order us to buy or do anything. It would be the end of federalism—not to mention individual rights—as we have known it for more than 220 years.

There is also a secondary argument made by defenders of the health care act. The Obama administration's fall-back position if it loses its Commerce Clause argument is to say that the fine for not buying government-approved health insurance is not a penalty, but a tax. The administration is asserting this because a *tax* to pay for a health care scheme would be constitutional under Congress's taxing authority. We argue in response that the government cannot all of a sudden start calling a penalty a tax to try to make the law legal. In fact, every court that has heard the government's tax argument has rejected it.

When Congress and President Obama debated the health care law, for political reasons, they repeatedly said that the fine for not buying health insurance was a penalty, not a tax. And indeed, under the law they passed, they structured it as a penalty. So now the administration is both flip-flopping and misrepresenting facts.

We will soon see which arguments the appeals court agrees with, because we will be arguing the case in the U.S. Fourth Circuit Court of Appeals on May 10th. Whatever that ruling, the case will end up in front of the U.S. Supreme Court. That is why we are also running a second track and asking the Supreme Court to skip the Fourth Circuit and take the case directly. We have asked the court for this expedited review because states are already spending huge sums to implement their portions of the health care act, businesses are already making decisions about whether to cut or keep employee health plans, and real health care reform is on hold until the Supreme Court rules. If we do not get this suit resolved as quickly as possible, we impose crippling uncertainty on the states, businesses, individuals, and our entire economy.

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Liberty as an Environmental Principle

As bad as the federal health care law is, the economic consequences of what the EPA has in store for us will be equally damaging to our freedom and our economy. Thus the EPA is another front in Virginia's federalism fight.

In December 2009, the EPA declared that carbon dioxide and other greenhouse gases are pollutants dangerous to public health because they are alleged to cause global warming. This finding gave the agency the immense power to regulate CO_2 emissions—and remember, this dangerous pollutant, carbon dioxide, is what we exhale from our bodies every second of every day.

For the ruling, the EPA relied primarily on data from a United Nations global warming report. Emails leaked in 2009 in the Climategate scandal showed that some of the world's prominent climatologists manipulated data to overstate the effects of carbon dioxide on the environment. Much of the U.N. report relied on that questionable data, and the EPA relied on that report. Since the revelations from the leaked emails became public, some scientists involved in the report have had to back off some of their positions and research. Renowned climate researcher Judith Curry of Georgia Tech, a long-time proponent of the global warming theory, admitted recently that there is no question that data in the U.N. report was

misleading, and that "it is obvious that there has been deletion of adverse data" that would work against the theory of rapid global warming in the last century.

Pursuant to this, in February 2010, my office petitioned the EPA to reopen its hearings on greenhouse gases and review new evidence. Instead it ignored our request—in fact, it ignored the law. So we filed a federal lawsuit to force the hearings to be reopened, and we are still awaiting our day in court.

If the EPA is allowed to move forward with its regulation of carbon dioxide, costs to every American household are projected to increase by $3,000 a year due to higher prices for energy, food, clothing, and any other goods that require energy to manufacture or transport. Talk about taxing the poor!

In a document the EPA published on regulating greenhouse gas emissions in cars and light trucks, it admits that its new rules would add about $950 to the price of each new vehicle. And buried deep in the report, the EPA's own models show that over the next 90 years these regulations would only reduce temperature increases by less than 0.03 degrees Fahrenheit. Lisa Jackson, head of the EPA, in testimony before Congress, called this amount of temperature difference "immeasurable." But that has not stopped the agency from trying to move the new auto regulations forward.

Greenhouse gas regulations will also cost businesses hundreds of millions of dollars in increased energy costs, and could price several industries out of business or force them overseas, resulting in permanent job losses.

These are serious consequences of decisions made by unelected bureaucrats. All we are asking the EPA to do is to look at *all* the data, not just the data that supports the pre-conceived views of the people in charge.

For my challenges to these rules and to the federal government, I am accused of being a flat-earther and an enemy of science. Nothing could be further from the truth. I am not only an attorney; I was also an engineer. As a former engineer, I have a certain trust in science: the math, the scientific method, the certainties of the laws of physics, and the objective quest for new answers. But when science gets tainted by politics and money, and facts are set aside in the name of

advancing a political agenda, it is no longer science.

And contrary to the image some in the media have created, I do not have a battle with environmental protection. In fact, my office works in close coordination with our Virginia regulatory agencies to enforce environmental laws. I also have seven children who will be on this earth for the better part of this century, and I have a vested interest in seeing that they have clean air, water, and land.

But I also have a vested interest in seeing that my children have the opportunity to get good jobs and achieve at least the same standard of living we have today. That means we have to balance care for our environment with care for our economy.

We also have to recognize that economic growth underwrites environmental protection. Wealthy countries pay for environmental improvement, and healthy economies are critical to it. The only places on earth that have strived for a clean environment share two key characteristics: free people and free markets. Economic success will help deliver environmental improvement far more effectively than any number of forcibly-applied regulations. Yet we are gradually suffocating our free market economy with command-and-control regulations from our federal government.

Freedom in the Balance

With the EPA's attempts to regulate our lives by regulating the by-products of practically everything we buy and everything we do, and with the federal government's attempt to assume the power to command us to buy its chosen health insurance, we face some of the most significant and unprecedented erosions of liberty in our lifetimes. And federalism—that tension between state sovereigns and the federal government—was designed for the very purpose of helping to preserve that liberty.

While we can derive some satisfaction from last November's election results as a backlash against the centralization and growth of raw federal power, we cannot repeat the mistakes of the past where conservative victories were followed by liberal policies. We must ensure that the newly elected officeholders have learned from past mistakes. We must hold the representatives we put into office accountable to first principles, and then demand from them concrete action. For the failure of conservative principles has not been due to the principles themselves, but to the failure to fight for them.

At a time such as this, when principled conservatives do not control the reins of power in Washington, state attorneys general become the first line of defense against federal government overreach. When I ran for Attorney General of Virginia, I said that if the federal government crossed certain lines, I would challenge it. Unfortunately, we have a federal government that is giving us more opportunities to challenge it than I would like. But we are keeping our promise. With fellow Virginians and the American people, we have planted our flag and we are taking a stand. And if we are successful, future generations of Americans will have a chance to enjoy the liberty that has made America the envy of the world.

Success in this fight for federalism is critical, for as Ronald Reagan warned us:

> Freedom is never more than one generation away from extinction. We did not pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same, or one day we will spend our sunset years telling our children and our children's children what it was once like in the United States where men were free. ■

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